

IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH KOLKATA
BEFORE SHRI N.V.VASUDEVAN JM, & DR. A.L.SAINI, AM

आयकर अपील सं./ITA No.797/Kol/2014

(निर्धारण वर्ष / Assessment Year :2010-2011)

ITO Ward-7(3), Kolkata, P-7, Chowringhee Square, R.No.17, 5 th Floor, Kolkata- 700 069	Vs.	M/s Energy Development Company Limited, EDCL House, 1A, Elgin Road, Kolkata-700020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCE 6969 K		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से /Revenue by : None

निर्धारिती की ओर से /Assessee by : Ms.Vandana Bhandari

सुनवाई की तारीख / **Date of Hearing** : **07/02/2017**

घोषणा की तारीख/**Date of Pronouncement** **03/03/2017**

आदेश / O R D E R

Per Dr. Arjun Lal Saini, AM:

The captioned appeal filed by the Revenue, pertaining to the assessment year 2010-2011, is directed against the order passed by the Id. Commissioner of Income Tax (Appeals)-VIII, Kolkata, in Appeal No.145/CIT(A)-VIII/Kol/13-14, dated 27.02.2014, which in turn arises out of an order passed by the AO u/s.143(3) of the Income Tax Act 1961, (hereinafter referred to as the 'Act'), dated 28.03.2013.

2. Brief facts of the case qua the assessee are that the assessee filed its return of income declaring Nil income on dated 14.10.2010, for A.Y.2010-11. The case of the assessee was selected for scrutiny through CASS and the AO framed assessment u/s.143(3) treating the forfeited amount of Rs.12,40,00,000/- as revenue income in respect of 75000 warrants. The assessee under consideration had forfeited 75000 warrant amounting to Rs. 12,40,00,000/- allotted to promoters and other investors

and transferred the said amount to the capital reserve. During the assessment proceedings the assessee submitted before the Assessing Officer that said amount is capital receipt and as such should not be treated as revenue receipt. But Assessing officer has ignored the submissions of the assessee and treated the said receipt as revenue in nature.

3. Not being satisfied with the order passed by the AO, the assessee filed an appeal before the CIT(A), who has deleted the additions of Rs.12.40 crores observing the followings :-

“7.8 On careful analysis of the decision of the ITAT Delhi Bench I find that the factual matrix of the decided case is identical to the facts involved in present case. In the impugned order the AO assessed the amount forfeited as appellant’s income assessable U/s 28(iv) of the I.T. Act. In the decided case due consideration of the terms of the issue of optionally convertible warrant the Tribunal came to the conclusion that the amount did not represent revenue receipt and it was also not assessable U/s 28 (iv) of the I.T. Act. So the facts involved in the present case are found to be identical to the issue involved in the case decided by the ITAT Delhi Bench, respectfully following the decision of the ITAT Delhi Bench, I hold that the AO was not justified in assessing Rs. 12.40 Crores as income of the appellant, assessable U/s 28 (iv) of the Act. The addition of Rs.12.40 crores is directed to be deleted. Ground No.2 is accordingly allowed.”

4. Not being satisfied with the order of Id. CIT(A), the Revenue is in appeal before us and has taken the following grounds of appeal :-

1. *That on the facts and circumstances of the case and in law the Ld. C.I.T.(A) - VIII, Kolkata has erred in holding that the AO was not legally and factually correct in invoking Sec.145(3) of the IT Act, 1961.*
2. *That on the facts and circumstances of the case and in law the Ld. CIT(A)-VIII, Kolkata has erred in not conforming the method of invocation of Sec.145(3) of the I.T.Act, 1961 as proper.*
3. *That on the facts and circumstances of the case and in law the Ld. CIT(A)-VIII has erred in holding the forfeiture of share*

warrants as capital receipt in nature and also deleting the addition of Rs.12.40 cores.

4. *That on the facts and circumstances of the case and in law the Ld. CIT(A)-VIII erred in not confirming the addition on forfeiture of share warrant amounting to Rs.12.40 cores.*
5. *That on the facts and circumstances of the case and in law, the Ld.CIT(A)-VIII, Kolkata erred in not applying the dictum of colourable device enunciated in the case of McDowell & Company Limited vs. C.T.O. (1985) 154 ITR 148.*
6. *That on the facts and circumstances of the case and in law, the Ld.CIT(A)-VIII, Kolkata erred in not allowing the addition made on forfeiture of share warrant amounting to Rs.12.40 crores to be added in Book Profit assessable u/s.115JB of the IT Act, 1961 which falls automatically in line with the addition.*
7. *The appellant craves leave to add, alter or abrogate any ground of appeal at the time of hearing.*

5.However, in this appeal the Revenue has raised a multiple grounds of appeal but at the time of hearing the solitary grievance of the Revenue has been confined to ground No.3 which relates to the issue whether forfeiture of share warrants is capital receipt in nature or Revenue in nature. Other grounds raised by the Revenue are supportive/consequential/premature grounds.

5.1 None appeared on behalf of the Revenue.

5.2. Ld. AR for the assessee has submitted before us that the Id. AO has concluded wrongly, that the amount of Rs.12.40 crores transferred by the assessee to the Capital Reserve and representing amount of share warrant forfeiture is a revenue receipt and should be taxed under section 28(iv) of the Act. The Ld. AR further submitted that this conclusion of the AO is without appreciation of the facts and the law on the subject. The Ld. AR also submitted that the amounts involved are capital receipts and

hence not taxable as income of the assessee. A share warrant is a financial instrument which entitles the holder thereof to acquire certain shares on certain conditions which are mentioned in the share warrant itself. The Section 114 of the Companies Act, 1956 deals with the issue and effect of a share warrant to a bearer. A public company limited by shares, if so authorised by its articles, may, with the previous approval of the Central Government, with respect to any fully paid-up shares, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares specified in the warrant. A combined reading of the provisions in the Companies Act, 1956 and the SEBI (DIP) Guidelines, clearly establishes that the share warrant is a financial instrument which can be converted into shares on the payment of a certain addition amount. Hence, the acquisition of a share warrant is the beginning of the share acquisition process and the money paid for the purchase of a share warrant is similar to share application money. The only difference being that share application money is refundable in certain conditions whereas the money paid for the acquisition of share warrants is non refundable. Since the money paid on purchase of a share warrant is non-refundable, the warrants can be considered at par with partly paid equity shares and hence are often treated as potential equity shares. The only difference between partly paid up equity shares and warrants is that the former may be entitled to equity dividend whereas the latter are not. The fact that for the purposes of

accounting, the share warrants are to be treated as potential equity shares is corroborated by the Accounting Standard 20 which governs the computation of Earnings Per Share (EPS). Therefore, as per AS 20 issued by the Ministry of Corporate Affairs on earning per share clearly shows that share warrants are potential equity shares. The assessee had in the financial year 2007-08 and 2008-09 allotted 35,00,000 and 40,00,000 lakh share warrants amongst promoters and independent investors who had paid an amount of Rs.12.40 crores in aggregate to the company as consideration for these shares warrants. In both these years, the assessee had disclosed these as part of the shareholders fund under the heading share warrant on the face of the balance sheet and had made adequate disclosures for the same in the notes to account. During the financial year 2009-10 relevant to the AY 2010-11, subscribers to the share warrants did not make any further payments. Keeping in line with the terms of the issue and the existing regulations, the share warrants lapsed and consequently the assessee forfeited the amount received at the time of issue of the warrants. The forfeited amount was shown as part of shareholders fund under the heading Capital Reserve and had made adequate disclosures for the same in the Notes to Account. As per the AO since the subscribers of the warrants have treated the said forfeiture as a Short Term Capital Loss, and the assessee has treated the said forfeiture as a Capital Reserve, there is no tax payout in either hand. This reasoning is devoid of any legal basis and can never form the basis of

completing an assessment. In addition to this, Id. AR for the assessee has relied on the following judgments :-

(i).Hoshiarpur Electric Supply Co. [1961] 41 ITR 608 (SC)

"The receipts though related to the business of the assessee as distributors of electricity were not incidental to nor in the course of the carrying on of the assessee's business; they were receipts for bringing into existence capital of 'lasting value. Contributions were not made merely for services rendered and to be rendered, but for installation of capital equipment under an agreement for a joint venture. The total receipts being capital receipts, the fact that in the installation of capital, only a certain amount was immediately expended, the balance remaining in hand, could not be regarded as profit in the nature of a trading receipt."

(ii).Kettlewell Bullen & Co. Ltd. [1964] 53 ITR 261 (SC)

"Whether a particular receipt is capital or income from business, has frequently engaged the attention of the courts. It may be broadly stated that what is received for loss of capital is a capital receipt: what is received as profit in a trading transaction is taxable income. "

The above view is fortified by the decision of the Karnataka High Court in the case of Commissioner of Income-tax, Bangalore v. Industrial Credit and Development Syndicate Ltd. reported in [2006] 155 TAXMAN 90. In this case the court has held that cessation of liability arising out of the early redemption of debentures does not give rise to any taxable income since the debentures were issued for the purposes of purchase of fixed assets.

(iii).Morley (Inspector of Taxes) vs Tattersall [1939] 7 ITR 316 (CA)

..:If a particular amount is not received as trading' receipt at the first instance, it would not be subsequently recorded as trading receipt due to change of circumstances"

(iv).Travencore Rubber & Tea Co. Ltd. [2000] 109 TAXMAN 250 (SC)

In this case the Apex court has reiterated the clear distinction between Income and Capital Receipt as under:

"Forfeiture of earnest money and advance were in the nature of capital receipt not chargeable to tax"

(v).Kushal K Bangia v. Income tax officer [2012] 18 taxmann.com 31, the Hon'ble ITAT Mumbai has held as under-

"It is only elementary that the connotation of income howsoever wide and exhaustive takes into account - only such capital receipts, which are specifically taxable under the provisions of the Act. Section 2(24)(vi) of the Act provides that income includes any capital gains chargeable under section 45. Thus it is clear that a capital receipt simplicitor cannot be taken as income. This clearly implies that a capital receipt in principle is outside the scope of income chargeable to tax and a receipt cannot be taxed as income unless it is in the nature of revenue receipt or is bought within the ambit of income by way of a specific provision in the Act. No matter how wide be the scope of income under section 2(24), it cannot obliterate the distinction between capital receipt and revenue receipt..... It is now well settled that in order to find out whether it is a capital receipt or revenue receipt one has to see what it is in the hands of the receiver and not what it is in the hands of the payer. The consideration for which the amount has been paid by the developers is, therefore, not really relevant in determining the nature of receipt in the hands of the assessee As held by Hon'ble Supreme Court, in the "case of Dr. K George Thomas v. CIT [1985] 156 ITR 412/23 Taxmann 46, "the burden is on the revenue to establish that the receipt is of revenue nature" though "once the receipt is found to be of revenue character, whether it comes under exemption or not, it is for the assessee to establish". . .

In the instant case the Ld. AO has not discharged its burden by bringing anything on record to prove that the receipt is revenue in nature. The reasons assigned by the Ld. AO were wrong and insufficient. Provisions of the act ought to have been properly construed and applied. The receipt and subsequent forfeiture of the share warrant money was towards capital contribution of the company and as such it cannot be held to be revenue in nature and consequently cannot be termed as income within the meaning of section 2(24) of the Act. All types of receipts cannot constitute income of an assessee. Capital receipts / loan receipts does not constitute income of the recipient. In the instant case, the money forfeited was received for the capital of the company. In the instant case, the share warrant money was forfeited as per the terms of the issue. This fact is not in dispute. It is settled position of law that by charging provisions of section 4 and 5, the general liability to tax is imposed upon income but the Income Tax Act does not provide that whatever is received by the assessee must be regarded as income chargeable to tax.

In all cases in which the receipt is sought to be taxed as income, burden lies upon the revenue to prove that it is within the taxing provisions. The revenue has not discharged the burden cast on it to establish that amount forfeited partakes the character of income. The amount when initially received by issuance of share warrants was not of income in nature. The mere fact that subsequently the warrant holders, on account of failure on their part to pay the call money / subsequent money has forfeited their right to receive back

the amount does not change the character of the receipt. If the warrant holders had exercised their option and paid the call money the entire amount would have gone into the share capital of the company. The amount forfeited does not fall under any head of income and as such the same is not chargeable to tax.

(vi).In Assisstant Commissioner of Income-tax v. Das & CO. [2010] 133 TTJ 542 (MUM.), the Hon'ble ITAT Mumbai has held as under-

“..... If the initial receipts of a business are not trading receipts in the hands of the recipient, subsequent operations cannot turn them into trading receipts. Therefore, the addition on account of forfeiture of security deposit was to be deleted”

Based on the above judicial pronouncements, it is clear that a capital receipt cannot be considered as income and no charging provision can be invoked to tax such a receipt. In the given case, the write back is of a capital liability and is akin to a capital receipt.

In the given case, it is clear that the Appellant has received the amounts on allotment of share warrants and the same is related to the capital structure of the Appellant and is definitely a part of the Fixed Capital of the Appellant.”

5.3. Having heard the submissions of Id AR for the assessee and perused the material available on records, we are of the view that there is merit in the submissions of the assessee, as the propositions canvassed by the Id AR for the assessee are supported by the judgments cited by him (supra). As Id AR for the assessee as pointed out that the money forfeited was received for the capital of the company. In the instant case, the share warrant money was forfeited as per the terms of the issue. This fact is not in dispute. It is settled position of law that by charging provisions of section 4 and 5, the general liability to tax is imposed upon income but the Income Tax Act does not provide that whatever is received by the assessee must be regarded as income chargeable to tax.

Besides, if the initial receipts of a business are not trading receipts in the hands of the recipient, subsequent operations cannot turn them into trading receipts.

Therefore, the addition made by AO on account of forfeiture of share warrants as capital receipt in nature, needs to be deleted. Hence, we do not hesitate to confirm the order passed by the Id CIT(A). Therefore, we confirm the order passed by the Id CIT(A).

5.4 In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on this 03/03/2017.

Sd/-
(N.V.VASUDEVAN)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(DR. A.L.SAINI)

लेखा सदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata; दिनांक Dated 03/03/2017

प्रकाश मिश्रा/Prakash Mishra,Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-ITO Ward-7(3), Kolkata
2. प्रत्यर्थी / The Respondent.-M/s Energy Development Co.Ltd.
3. आयकर आयुक्त(अपील) / The CIT(A), Kolkata.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, कोलकाता / ITAT, Kolkata